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No. 1340

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

SUNKIST GROWERS, INC., *Petitioner,*

v.

CASE-SWAYNE CO., INC., *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF CASE-SWAYNE CO., INC. IN OPPOSITION

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Case-Swayne Co., Inc., respondent (hereinafter referred to as Case-Swayne) opposes the petition for writ of certiorari of Sunkist Growers, Inc. (hereinafter referred to as Sunkist).

Opinions Below

The opinions of the Court of Appeals are reported at 369 F. 2d 449. The District Court's memorandum and order granting motion for directed verdict is unreported.

Jurisdiction

The decision of the Court of Appeals was entered on November 21, 1966. Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit provides

that a petition for rehearing may be presented within 30 days after judgment. On December 16, 1966, respondent filed petition for rehearing to review so much of the decision of the United States Court of Appeals as held that Sunkist was a cooperative organized in compliance with section 1 of the Capper-Volstead Act. On December 22, 1966, Sunkist filed a petition for rehearing. Sunkist's petition for rehearing was not timely being filed one day beyond the thirty-day period permitted by Rule 23 of the Court of Appeals. On January 12, 1967, both respondent's and petitioner's petitions were denied by the Court of Appeals.

Statute Involved

Section 2 of the Sherman Act (15 U.S.C. 2) provides in pertinent part[1]:

> "Every person who shall monopolize, or attempt to monopolize, . . . any part of the trade or commerce among the several States, . . . shall be deemed guilty of a misdemeanor, . . ."

Questions Presented

Sunkist presents four questions:

1. May product oranges produced in California and Arizona be a relevant market for purposes of determining the possible existence of a monopoly under § 2 of the Sherman Act where (a) product oranges have value only because they can be processed into products

[1] The District Court in Pretrial Order No. 1 ruled as a matter of law that Sunkist (and the Exchange Orange Products Co. and Exchange Lemon Products Co. who were original defendants with Sunkist) had complied with section 1 of the Capper-Volstead Act and consequently conspiracy in violation of sections 1 or 2 of the Sherman Act could not exist between Sunkist, Exchange Orange and Exchange Lemon (Cl. Tr. 1307-1310). In Pretrial Order No. 2, the District Court ordered the issues confined to whether Sunkist had a monopoly on product oranges grown in California and Arizona, whether it had illegally used such monopoly power or had attempted to monopolize such oranges and damages (Cl. Tr. 1359-60).

which are sold in a national products market; (b) California and Arizona produce only approximately 10% of the product oranges, the products from which are marketed in such national market; and (c) the price at which product oranges may be sold in California and Arizona is limited by the national products market?

2. Under such circumstances, what are the tests for determining the relevant market under § 2 of the Sherman Act where a derivative market is involved?

3. Can different tests be used to define a submarket which is proposed as the relevant market in a monopoly case so as to produce a market which is so narrow that it is not subject to monopolization?

4. Are the criteria for determining relevant market under § 7 of the Clayton Act necessarily the same as those under § 2 of the Sherman Act?

Sunkist's dominant question 1 (on which questions 2-4 are dependent) is based on its premise that "the price at which product oranges may be sold in California and Arizona is limited by the national products market." We do not believe such premise in any way affects the issues of relevant market. However, as mentioned *infra,* under Argument IV the premise is false being contradicted by substantial evidence that Sunkist's dominant control of product oranges produced in California and Arizona enabled it to control the price of product oranges produced in this area.

Statement

In Pretrial Order No. 1 the District Court ordered two trials. The first to cover the issue of liability and if respondent prevailed, the second to cover damages (Cl. Tr. 1307-1310). Trial was had before a jury from November 10, to November 30, 1964, and respondent (plaintiff below) rested. Petitioner (defendant below) without offering evidence moved for a directed verdict which motion was

granted. On March 2, 1965, final judgment was entered pursuant to the Court's order granting defendant's motion for a directed verdict (Cl. Tr. 1964-1966; 2093-2104; and 2110-11). In the District Court's "Memorandum and Order Granting Motion For Directed Verdict" the Court stated that there was no question but "that Sunkist dominated 70% of the citrus produced" in the California-Arizona area. But the Court further ruled (as stated in the Court of Appeals' decision) that:

> "The district court's granting of the directed verdict was premised upon the conclusion that the 'relevant market' was national rather than limited to California-Arizona, and that in light of this plaintiff had not shown evidence of an illegal monopoly" (Appendix, Sunkist's Petition, p. 7).

Substantially, all oranges marketed in the United States are grown in three areas, the California-Arizona area, Florida and Texas (R. Tr. 454). During the period involved in this action (May 15, 1958-January 31, 1962) Sunkist *admittedly* controlled approximately 70% of all oranges grown in the California-Arizona area which embraced approximately 67% of all such oranges diverted for the manufacture of orange products. Other small cooperatives controlled for their own use 18% of oranges grown in California and Arizona. The balance of such oranges (approximately 12%) represented those grown by independent growers and were in the main handled by the Morgan Ward Company.[2]

The product involved in the action is what are denominated "product oranges" (see Pretrial Order No. 2, *supra*).

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[2] These figures are based on defendant's admission in response to plaintiff's request for admission (see Answer to Request No. 7, Cl. Tr. 1370-1371). It was also supported by testimony of G. Holley of the Stanford Research Institute (R. Tr. 990-1020).

Size and appearance can determine whether particular oranges should be diverted to product use. *But that is not the only determining factor. Oranges are utilized for product use that could be sold as fresh oranges in order to maintain fresh orange prices* (Sunkist's manager, F. R. Wilcox, R. Tr. 951:16, 952:4, 966:2-8).

The market for product oranges (the purchasers) are manufacturers of orange products. In California, these included such manufacturers as Case-Swayne, General Foods Corporation, TreeSweet Products Company and Hyland-Stanford Corporation. These purchasers, as a practical matter, depended on product oranges grown in California and Arizona. Freight costs of transporting product oranges from Texas or Florida prevented use of such oranges by California manufacturers because they competed in the sale of orange products with manufacturers of orange products located in Florida and Texas.

Case-Swayne's President, Amos Swayne, testified:

> "Q. In what geographical area do you obtain the oranges for your business?
>
> "A. California and Arizona.
>
> "Q. Have you ever used oranges from Florida or Texas?
>
> "A. No, we have not.
>
> "Q. Can you tell the jury why you have not?
>
> "A. The cost of transporting whole fruit from either Texas or Florida freight-wise would be prohibitive. It is a long distance from either Texas or Florida to California and, basically, half of the weight of a pound of oranges is represented by the peel and the pulp and the seeds, and the other half basically—I say basically, half is represented by juice, so the cost of transportation would become prohibitive to move it from either Texas or Florida to California.
>
> "Q. Do you know of any other orange processing company making single strength juice or similar prod-

uct that has ever obtained their orange supplies other than from California or Arizona?

"Mr. Beardsley: You mean in this area?

"Mr. Henderson: In this area.

"The Witness: I do not.

"By Mr. Henderson:

"Q. May I conclude that you must depend upon your oranges grown in California and Arizona in order to continue your business?

"A. We definitely must." (R. Tr. p. 439-440:2)

When Sunkist's manager, F. R. Wilfox, was confronted with the question of whether manufacturers of orange products must, as a practical matter, depend on oranges produced in the California-Arizona area in order to compete with such manufacturers in Florida or Texas the Court interrupted answer, stating:

"The Court: There is no dispute about that, is there, Mr. Henderson? The testimony has been that it would be uneconomical to try to ship fruit into California or Arizona from Florida or Texas. You have already established that. You are just accumulating evidence now. There is no dispute about that." (R. Tr. 982:18-24). See also testimony of Robert McCracken, R. Tr. 86:4-20).

Argument

The Court of Appeals' decision is clearly correct and further review is not warranted.

I

The Court of Appeals mentions that, in advance of trial, it was the trial Court's position that the relevant product market was product oranges and the relevant geographic market California and Arizona, but at the close of Case-Swayne's case was persuaded that the relevant product market included orange juices and concentrates and that

the relevant geographic market was national (Appendix, Sunkist's petition, p. 13). The Court of Appeals most carefully and thoroughly analyzed the authorities on relevant market, applied them to the relevant facts and ruled that the District Court's conclusions were erroneous. (Appendix, Sunkist's petition pp. 7-17).

Although Sunkist questions the Court of Appeal's decision on revelant market, no where in its 40-page petition does it carry the torch on the District Court's conclusion on the relevant product and explicitly challenge the Court of Appeal's ruling that the relevant product was product oranges. Mayhap, this was by reason that "The market for raw products [product oranges in this case] is among the processors". (Appendix p. 15, Sunkist's petition). And under the teachings of the Supreme Court's decisions in *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962), *United States* v. *Grinnell Corp.,* 384 U.S. 563 (1966), *United States* v. *Pabst Brewing Co.,* 384 U.S. 546 (1966) it could hardly be argued that product oranges did not constitute the relevant product in this case. What Sunkist repetitiously argues is that California manufactured orange *products* competed in *the product market* with Florida manufactured orange *products* (Appendix, Sunkist's petition pp. 7, 9, 17-21). But this unquestioned fact was (as is stated by the Court of Appeals, Appendix, Sunkist's petition p. 7) one of *Case-Swayne's complaints* in "that it was unable to purchase oranges for product use from Sunkist at a price that would enable it to compete with canned juice shipped in from Florida".

Despite Sunkist's vague contentions we discuss relevant market both product-wise and geographically.

As above mentioned, these were "Johnny come lately" issues with the District Court. Trial was had from November 10, 1964 to November 30, 1964, under the District Court's Pretrial Order No. 2 that the monopoly issues were confined

to *product oranges grown in California and Arizona* (Cl. Tr. 1359-60). During the trial, *Sunkist* reminded the Court that the relevant product had been defined as product *oranges* and the geographic market limited to *California and Arizona.*

> "Mr. Hufstedler: Now may I read the issue defined by the court in pretrial order No. 2?
>
> "The Court: All right.
>
> "Mr. Hufstedler: 'Did Sunkist have a monopoly of product oranges grown in the California-Arizona area?'
>
> *"There is no issue, your Honor, with respect to the products themselves."*

Sunkist presents no question that has not been authoritatively decided by this Court. In determining the relevant geographic market a proper test is the "geographic structure of supplier-customer relations." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 357 (1963). The purchasers of product oranges were manufacturers of orange products. Consequently, the relevant geographic market is determined by whether such purchasers could as a practical matter obtain product oranges from suppliers outside of California and Arizona. *United States* v. *Philadelphia National Bank, supra; Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961); *Standard Oil Co.* v. *United States*, 337 U.S. 293 (1945); *United States* v. *Pabst Brewing Co., supra.*

Respecting the relevant product: It can hardly reasonably be argued that there was available to manufacturers of orange products other "products reasonably exchangeable" with product oranges for the manufacture of orange products. Particularly is this so when the evidence disclosed that California manufacturers of orange products had to rely on oranges grown in California and Arizona to compete with Florida manufacturers and as hereinafter mentioned

when Sunkist reduced their orange supplies and increased orange prices, they were driven from California. Even if (as was assumed by the Court of Appeals) product oranges have little value in their "raw state," as was stated by the Court of Appeals: "The market *for raw products is among the processors rather than the ultimate consumer.*" (Our emphasis) (Appendix, Sunkist's Petition, p. 15). The relevant product market was product oranges. *Brown Shoe Co.* v. *United States, supra; United States* v. *Grinnell Corp., supra; United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377 (1956); *United States* v. *Pabst Brewing Co., supra.*

II

Sunkist's suggestion in question 3 that the relevant market for product oranges (the manufacturers of orange products) is so narrow to be "not subject to monopolization" is unrealistic. A look at Sunkist's operations alone refutes such contention. Sunkist's multifarious orange products included juices, concentrates, blends, juice base, oil, pectin, pharmaceuticals and cattle feed (p. 5, Sunkist's Petition). The annual dollar value of product oranges controlled by Sunkist for the years involved ranged from $16 million to approximately $23 million (Plf's Exh. 97, R. Tr. 628-632).

Admittedly, the number of manufacturers of orange products was narrowed in California by Sunkist's elimination of such competitors as General Foods Corporation, Hyland-Stanford Corporation and forcing TreeSweet Products Co. to establish a plant in Florida to meet its California demand for orange products as is mentioned *infra,* point IV.

III

In question 4 Sunkist requests the Court to decide whether a different criteria should be applied for determining relevant market under section 2 of the Sherman Act than under section 7 of the Clayton Act.

With respect to the relevant product, this question has been authoritatively decided by the Supreme Court. *United States* v. *Grinnell Corp.*, 384 U.S. 563 at p. 573 (1966).

> "We see no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act."

It has long been settled that section 2 of the Sherman Act proscribing monopoly of "any part" of commerce has a geographic significance; and that a relevant geographic market exists under the Sherman Act *"where the purchasers cannot, as a practical matter, turn to suppliers outside their own area."* (Our emphasis) See *Standard Oil Co.* v. *United States*, 337 U.S. at p. 299, footnote 5 and cases there cited. Further, the Supreme Court has not drawn distinctions relating to geographic markets between the language of section 2 of the Sherman Act (making it unlawful "to monopolize, or attempt to monopolize . . . *any part of the trade or commerce*") and that of section 7 of the Clayton Act (proscribing certain mergers "in any section of the country"). *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966); *United States* v. *Philadelphia National Bank, supra; Tampa Electric Co.* v. *Nashville Coal Co., supra.*

IV

Sunkist does not challenge the decision of the Court of Appeals that "there was sufficient evidence from which the jury could find further that Sunkist engaged in monopolistic practices or an attempt to monopolize proscribed by section

2 of the Sherman Act." (Appendix, Sunkist's Petition, p. 17). But Sunkist attempts to distort the issues and applicable standards governing relevant market that have been carefully defined by the Supreme Court in the many decisions cited by the Court of Appeals. Sunkist resorts to incomplete, misleading quotations of testimony and irresponsible statements relating to monopoly issues. One of many examples of a quotation of part of a witnesses' testimony out of context so that the quoted portion indicates the exact opposite of the witnesses' testimony is Sunkist's quotation of the testimony of Morgan Ward at page 16 of Sunkist's petition:

> "Q. Is it your opinion, then, that the market conditions with respect to Florida product oranges had more effect on the price of product oranges in California than any one factor? A. They have effect on the overall United States. . . ." (*P. 16*, Sunkist's Petition).

The *complete* testimony of Morgan Ward in answer to the question above-quoted was as follows:

> "A. They have effect on the over-all United States. Then those who set prices on the fruit in California look at what is going on all over the Unted States, and at that time the prices were set in California by the leading growers, Sunkist set it, using all those things to do it, I assume. *But the price of by-products in this state has, ever since I have been in the business since 1934, been set by Sunkist. At one time it was called California Fruit Growers Exchange, and Sunkist at this time.*" (Our emphasis)

Sunkist *does* quote Morgan Ward's complete answer to the question on page 24 of its petition. But Sunkist accompanies it with the irresponsible statement: "The only testimony in the record designated to show that Sunkist

controlled prices of product oranges in California was that of Morgan Ward *in one answer.* (Our emphasis)

In addition to his testimony above quoted, Morgan Ward also testified:

"The COURT: May I ask a question here?

Mr. Henderson: Yes.

The COURT: This is preliminary to that. You were representing these independent growers.

The WITNESS: Yes, sir.

The COURT: You wanted to get as much money for their fruit as you possibly could.

The WITNESS: That's right.

The COURT: And so you sold the fruit at the highest price that you could obtain.

The WITNESS: That is true.

The COURT: All right. Now you can tell us how you obtained that price.

The WITNESS: *Well, in the citrus by-product business, we know that Sunkist is the largest, and the days when they set a price, we followed that price.*

Then when they put out bids, we found out what those bids were, and if it was 2 or 3 days before we found out what was accepted, we waited until we found out what the top bid was, and then we billed our customers retroactively back so that everybody in the citrus business were competitive.

Then when the Sunkist did not sell any fruit at all on any basis, then we would find out from their packing houses, we would talk to employees here and there and we would find out, Well, what do you think you are going to pay for by-products fruit?

Well, they would say, "from the powers that be in Sunkist, we are going to receive so and so.

Then we would go from there and arrive at a price we thought would be comparable so that all would be equal in price in the State of California. *That's the only way we could do it.* . . .

Q. Were you familiar with the price of other product orange suppliers during that period?

A. Yes.

Q. Did they generally follow the Sunkist price?

A. To the best of my knowledge, the whole industry did. . . .

Q. By and large did the prices of Sunkist become the prices of product oranges, California product oranges?

A. That is what I said. That's true." (R. Tr. 374:6-377:9)

Morgan Ward, who handled approximately all oranges of independent growers produced in the California-Arizona area was in the best position to know who controlled the price of product oranges in the area. His testimony alone was substantial evidence of Sunkists' control of product orange prices. But his testimony was corroborated by TreeSweet president Robert Bucheim:

"Sunkist is the largest, and the days when they set a price, we followed that price". (R. Tr. 374:10-21)

And by Robert McCracken:

"The COURT: The question is how did you individually fix the price, not somebody else; how did you tell the grower how much you would pay him for his fruit?"

The WITNESS: I heard what Sunkist estimated they were going to return, and that is the price we paid for independent fruit." (R. Tr. 123:15-125:3)

The above testimony of Robert Bucheim and Robert McCracken is neither mentioned or quoted by Sunkist.

An example of one of many irresponsible assertions by Sunkist in seeking to distort the relevant market issues appears on page 9 of its petition, i.e.:

"There was no evidence that Sunkist possessed the power to control prices or exclude competition."

This erroneous statement is repeated on page 12 and 24 of Sunkist's Petition.

We cite some of the evidence on these issues that Sunkist has overlooked:

(a) *Price Control*—The evidence of Morgan Ward (above quoted) who handled all the product oranges of independent growers refutes Sunkist's assertion. See also the testimony of Robert Buchheim and Robert McCracken above quoted.

(b) *Exclusion of Competitors*—Sunkist's [3] handling of oranges for product use was vertically integrated with dual distribution. It sold its orange products in competition with other manufacturers of orange products who relied upon Sunkist for their product oranges. (General Foods, R. Tr. 534:4-10; 549:12-550:3; Hyland-Stanford, R. Tr. 513:12 to 514:6; TreeSweet, R. Tr. 345:2-22; 706:13-25; Case-Swayne Co., R. Tr. 792:6-13; 823:3-17). California Valencia oranges are the principal oranges utilized for single strength product juice in California sold in competition with Florida products. (R. Tr. 486:22-25; 488:6-21) Sunkist by the device of maintaining the prices of California Valencia product oranges over prices of Florida product oranges, which contain more sugar solids, (R. Tr. 1195; 509:22 to 510:8) and limiting supplies available to manufacturers (R. Tr. 611-615:2) eliminated General Foods and Hyland-Stanford from California (General Foods, R. Tr. 544-548; 549-550; *999-999b* [4]; Hyland-Stanford, R. Tr. 513, 515, 528, 1081-1084).

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[3] In referring to Sunkist's handling of oranges, we include the functions of Exchange Orange Company before it was merged into Sunkist on October 31, 1958. Exchange Orange was a 100% owned subsidiary of Sunkist. (Cl. Tr. 1367-1368)

[4] Evidence contained in R. Tr. 999-999b is from a report prepared by G. Herbert Holley, economist, of the Stanford Research Institute "to advise . . . General Foods, whether they should continue with the processing plant in California" (R. Tr. 990-991; 1008:22 to 1009).

Sunkist forced TreeSweet to construct a plant in Florida to meet its California market for orange products. TreeSweet was a leader in the field, packing more single strength juices than anyone else in California (R. Tr. 705-708).

Sunkist's irresponsible assertions that it is not responsible for Case-Swayne's inability to obtain oranges (Sunkist's Petition, p. 35 *et seq.*) are refuted not only by the above-cited evidence but by other evidence mentioned by the Court of Appeals in ruling that Case-Swayne "made a prima facie case for the jury":

> "boycotting appellant [Case-Swayne] by refusing to sell appellant product oranges while selling to other processors; . . . preventing TreeSweet from delivering oranges TreeSweet had committed to appellant; . . . Sunkist's . . . admitted purpose to control all the oranges it could get and utilize all of them in its own manufacturing facilities; . . . preventing Placentia Orange Distributors from fulfilling its promise to sell appellant 5,000 tons of oranges in 1957; . . . policing the Sunkist system to punish violators of the Sunkist 'restrictive tying contracts'; . . . wrongful use of dual distribution by lowering single strength juice prices after competing manufacturers had purchased product oranges at prices established by Sunkist; . . . use of consignment contracts and its low 1956 bid (compared with its 1955 bid) to the Department of Agriculture." (Appendix, Sunkist's Petition, pp. 19, 21).

Conclusion

Sunkist's petition for writ of certiorari should be denied.

Respectfully submitted,

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W. GLENN HARMON,
by *William H. Henderson*

J. EDWARD JOHNSON,
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(1483-7)